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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

FRANCES MARINO, ADMINISTRATRIX,
Petitioner,
v.
TRAWLER EMIL C. INC. ET ALS.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Frances Marino, administratrix of the estate of Michael Marino, respectfully prays that a writ of certiorari issue to the Superior Court for the County of Suffolk and Commonwealth of Massachusetts to review the judgment of that court entered on January 17, 1966, in accordance with a rescript entered by the Supreme Judicial Court of Massachusetts on January 6, 1966, in which the said court ordered petitioner's exceptions overruled. These exceptions were duly taken and allowed to the direction of verdicts for the defendants on the petitioner's counts for a Jones Act recovery for the death of her husband, Michael Marino, entered by the trial judge of the Suffolk Superior Court of Massachusetts after the close

of the evidence. The judgment of the court below is entered on its docket and is contained in the official record of the court below (R., Docket Entries, 8). The said docket entry is hereto appended and marked Appendix A. The rescript of the Supreme Judicial Court of Massachusetts is contained in the official record of the court below (R., Rescript, 1) and is hereto appended and marked Appendix B.

I. Opinions Below.

The opinion of the Suffolk Superior Court of Massachusetts does not appear in any official reporter. However, the reasons of the trial judge for directing verdicts for the defendants under the Jones Act counts are printed in the record of the court below (R. 41) and are hereto appended and marked Appendix C. The decision of the Supreme Judicial Court of Massachusetts does not appear, as yet, in the official reports. It is contained in the official record of the court below (R., Dec.) and is hereto appended and marked Appendix D. It may be found in 1966 Mass. Adv. Sh. 47 and in 213 N.E. 2d 238.

II. Jurisdiction.

The judgment of the Suffolk Superior Court of Massachusetts sought to be reviewed is dated January 17, 1966, and was rendered in accordance with a rescript of the Supreme Judicial Court of Massachusetts entered January 6, 1966, overruling the petitioner's exceptions duly taken and allowed to the direction of verdicts for the defendants under the Jones Act counts by the trial judge at the close of the evidence (R. 3-4, 40). No rehearing of the decision of the Supreme Judicial Court of Massachusetts was sought.

The jurisdiction of this court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. § 1257, and the time allowed for review is conferred by 28 U.S.C. § 2101 (c).

The reasons for invoking the jurisdiction of this court are that the highest court of the Commonwealth of Massachusetts has interpreted the Jones Act restricting its benefits to seamen who serve aboard a vessel in violation of some clear pronouncements of this court and affecting a whole industry in a novel case not heretofore decided.

III. Questions Presented.

In an action brought under the Jones Act (46 U.S.C. § 688) to recover for the death of a fish-spotter in an airplane spotting surface fish for four fishing vessels engaged in seining for "porgies," an industrial fish, in Massachusetts Bay within a marine league from shore, the questions presented for determination by this court are as follows:

A. Where an aerial fish-spotter performs work that was formerly performed by one of the ship's crew from the mast and his work is integrated with that of the ship's crew so that a single task is being performed, is he precluded as a matter of law from the benefits of the Jones Act because his work is not performed aboard a vessel?

B. Where the aerial fish-spotter as above described was hired and paid by a company that purchased the fish in advance from the vessel owners and the fish-spotter's job is to direct the fishing vessel to the fish and its crew in how to encircle the fish and when to drop its seine, do those facts as matter of law preclude the fish-spotter from a Jones Act remedy?

C. Did the evidence offered by the petitioner with respect to the fish-spotter's status as a Jones Act seaman

and an employee of the defendants, within Jones Act contexts and the Federal rule for the submission of a Jones Act case, require the submission of the case to the jury on that issue?

IV. Statutes Involved.

The pertinent statutes involved are (1) the Merchant Marine Act of 1920, commonly known as the Jones Act, 46 U.S.C. § 688; (2) the Federal Employers' Liability Act, 45 U.S.C. § 51, hereafter referred to as the F.E.L.A., and (3) the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 902 (3) and 903 (a) (1), hereafter referred to as the L.H.C.A. The pertinent portions of these statutes are hereto appended and marked Appendices E, F and G, respectively.

The Massachusetts Death Statute, G.L. c. 229, § 2C, is hereto appended and marked Appendix H for the purpose of showing that it permits a limited recovery for death, based on culpability, and therefore the petitioner was aggrieved by the direction of verdicts under the Jones Act counts.

V. Statement of the Case.

This is a case of first impression that affects the whole fishing industry. The use of an airplane to spot fish for fishing vessels engaged in catching surface fish is of recent origin (R. 7). In the United States the aerial fish-spotter is employed to spot surface fish such as tuna, sardine, shrimp and menhaden, an industrial fish. Since the aerial fish-spotter no longer performs his work aboard a vessel, his right to avail himself of a Jones Act remedy is seriously disputed and in this case was denied as matter of law for that reason.

The petitioner brought an action of tort in the Suffolk Superior Court of Massachusetts, with a claim of trial by jury, to recover damages for the death of an aerial fish-spotter engaged in fish-spotting activities for four fishing vessels seining for "porgies," an industrial fish, in Massachusetts Bay within the 3-mile limit. The plane in which the decedent was riding but not piloting collided in the air with another plane similarly engaged for the said four fishing vessels. The planes fell into the sea and all occupants of the planes were killed (R. 1). Recovery for the decedent's death was sought against all four vessel operators under the provisions of the Jones Act, or, in the alternative, under the provisions of the Massachusetts Death Statute, G.L. c. 229, § 2C. The declaration, as amended, contained a Jones Act count for death and a Massachusetts Death Statute count against each of the defendants (R. 1, 2, 24-31).

The case was tried before a judge sitting with a jury. At the close of the evidence the defendants moved for directed verdicts on all counts. The trial judge directed verdicts for the defendants on all Jones Act counts, namely counts I, V, XII and XVII, and submitted the Massachusetts Death Statute counts, namely counts III, VII, XV and XIX, to the jury; and noted and saved all exceptions, duly taken, by both the plaintiff and the defendants to his rulings on the defendants' motions for a directed verdict and the verdicts of the jury rendered in accordance therewith (R. 3-4).

The jury returned verdicts for the plaintiff in the sum of $5,800 on each of the Massachusetts Death Statute counts (R. 4). The plaintiff, being aggrieved by the court's direction of verdicts for the defendants under the Jones Act counts and the verdicts of the jury rendered in accordance therewith, timely filed her bill of exceptions, which was duly allowed, as amended (R. 20).

The trial judge stated his reasons for directing verdicts for the defendants under the Jones Act counts for he wanted them to be known by a reviewing court. He said: "[T]here is no reasonable evidentiary basis to support a jury finding that Wezesa [Marino], the decedent, at the time of his death was a seaman or member of the crew of any vessel or vessels here involved, under the Jones Act. That is, I feel, sufficient to warrant a directed verdict on the four counts under the Jones Act. There is also unrepudiated and clear evidence that Marino was never an officer on board or a member of the crew of the four boats involved, and was not paid either directly or indirectly by them; and, further, he was not subject to the control, legal or actual, of anyone—even the pilot of the plane in which he was riding, in connection with the fishing operation. It was he, in fact, who contacted, and to some extent controlled, the operation of both the plane and the boats during the fishing operation" (R. 41).

The Supreme Judicial Court of Massachusetts in overruling the petitioner's exceptions said: "We prefer to base our decision on the ground stated by the trial judge that there was no evidence on which to base a finding that Marino was a 'member of the crew' of any of the defendants' vessels." And the court further said: "It is agreed that Marino never served in any capacity on board any of the defendants' boats. We hold that this fact is determinative" (R., Decision 6-7, Brief 25).

VI. Statement of the Facts.

The evidence presented by the petitioner to establish the aerial fish-spotter's status as a "crew member" of the defendants' vessels and their "employee" at the time of injury was as follows:

The petitioner's intestate, Marino, a commercial fisherman for many years (R. 17), at the time of the accident was engaged in spotting fish for four vessels operated by the defendants (R. 3), an activity usually performed by a crew member (a mastheadsman) from the crow's nest of the mother boat and from the mast of the seine boat (R. 7), but on this occasion the fish-spotting activity was being conducted by Marino from an airplane furnished by the defendants and Gloucester By-Products Company, hereinafter referred to as "Gloucester," a manufacturer of fish products for the animal trade (R. 5, 9).

Seining for porgies is seasonal (May-October) and is conducted by fishing vessels in groups (R. 4). Prior to the use of an aerial fish-spotter the fishing vessel would leave port and steam for the likely fishing grounds. On arrival, one of the crew, the mastheadsman, would go up into the crow's nest of the mother boat, about 40 feet above the deck, and scan the ocean for the fish. On sighting it, he would signal the captain in the pilot-house, directing him to the fish. When the captain approached the fish, he would order most of the crew into the seine boat, and the mastheadsman would go up into the mast of the seine boat about 20 feet above the deck and signal the helmsman of the seine boat how to encircle the fish and when to drop its seine (R. 7).

With the advent of the aerial fish-spotter, the fishing vessel would remain in port and the airplane would search the likely fishing grounds. On sighting fish he would communicate directly with the fishing vessels by radio-telephone or indirectly through Gloucester by radio-telephone, arranging a rendezvous. When the rendezvous was accomplished the aerial fish-spotter would direct the fishing vessel, whose turn it was to the fish by radio-telephone communication with its captain. As the fishing vessel

neared the fish, the captain would order most of the crew into the seine boat and the mastheadsman would take his position in the mast of the seine boat. The aerial fish-spotter would then direct the mastheadsman by radio telephone communication on how to encircle the fish and when to drop the seine. After the seine is dropped the aerial fish-spotter would set the next boat on fish in the same manner (R. 7-8).

Gloucester, by oral contract, had agreed to purchase the total catch of the four defendants' vessels for the 1958 industrial fishing season, and to obtain the services of an airplane to spot fish for the four boats, payment for the plane and pilot to be shared between them, one share each.[1] The pilot was paid by Gloucester on an hourly basis and Gloucester obtained reimbursement for the boat owners' respective shares (R. 45).

Gloucester obtained the services of one Fogg, a pilot who also "doubled" as fish-spotter, and for several months he conducted fish-spotting operations for the defendants (R. 4-5). About August, 1958, to increase the total catch, and to prevent arguments among the four defendants as to whose turn it was to be "set" on a catch, the defendants requested Gloucester to obtain the services of another additional airplane for fish-spotting, payment to be made on the same basis as previously agreed upon (R. 5, 6, 11).

Gloucester, through Fogg, obtained the services of one Auclair, a commercial pilot and owner of a Piper J3 airplane, payment to be made to Auclair through Fogg by Gloucester. Auclair had no experience at fish-spotting. Gloucester hired Marino to act as a fish-spotter on a weekly basis. The defendants agreed to pay their proportionate share for the Auclair plane, but refused to pay any share of Marino's wages, stating that the boats were not

[1] Gloucester paid one-fifth of the cost.

making enough money (R. 5-6). Gloucester paid Marino's wages, but received no reimbursement from the defendants for any part of his wages. Gloucester informed Marino that he (Marino) would be working in an area where Gloucester could not control him, and all Gloucester could do was to pay his wages (R. 7).

Auclair, on occasion, substituted Leonard Wezesa as a pilot of his plane on fish-spotting activities, and Wezesa was pilot at the time of the accident. The defendants, including Gloucester, had no knowledge of Wezesa until after the crash. Fogg knew of the substitution and agreed to it with Auclair: "If he [Wezesa] is capable, let him go" (R. 7, 14). Wezesa had no headset with which to communicate with the boats at the time of the accident. Marino alone was in contact with the vessels by radio-telephone (R. 16).

Gloucester had a radio telephone by which it could and did directly communicate with the defendants' boats within a radius of 20 miles and indirectly with the said boats through radio-telephone communication with the planes involved within a radius of 80 to 90 miles. However, its communications with the boats related to the amounts of their catch, relaying messages for the purchase of ship's supplies and family messages, and answering inquiries with respect to the whereabouts of the planes (R. 6).

VII. Argument.

A. There is No Minimum Requirement that a Jones Act Seaman Serve Aboard a Vessel.

The Supreme Judicial Court of Massachusetts cited two cases, *Sullivan* v. *American President Lines, Ltd.* (1961, N.D. Cal.), 206 F. Supp. 547, and *Chance* v. *United States*

(1959, 5th Cir.), 266 F. 2d 874, in support of its decision that service aboard a vessel is a minimum requirement of a Jones Act seaman. Neither of these cases supports its decision, but, on the contrary, supports the petitioner's contention to the contrary.

In *Sullivan, supra,* the plaintiff was employed by the shipowner as a maintenance worker and was assigned to repair a lifeboat on the dock. During a "coffee break" and while riding in a motorized jitney en route to a coffee shop, he was injured. Summary judgment was granted for the lack of a triable issue as to whether Sullivan was a Jones Act seaman. The court said that, to be a crew member of a vessel, "He must have had a more or less permanent connection with some vessel [cases cited]. And he must have contributed in some logical way to the navigation or operation of at least some vessel as a vessel."

In *Chance, supra,* an aerial fish-spotter sought to recover a maritime lien for his wages. The trial court, sitting in admiralty, considered the evidence and concluded that he was not a member of the crew of a vessel entitled to a lien for his wages. The Court of Appeals, recognizing the teachings of *Grimes* v. *Raymond Concrete Pile Co.* (1958), 356 U.S. 252, namely that in a proper case the question must be submitted to a jury, said that, the trial court having considered the evidence and concluding that Chance was not a Jones Act seaman, on the record this determination was not clearly erroneous.

It should be noted that more liberal rules of law are employed in determining who is a "crew member of a vessel" for the purposes of the Jones Act than for the purposes of the lien law. A captain is considered a member of the crew of a vessel for the purposes of the Jones Act although he usually is not considered a member of the crew for the purposes of the lien law. *Warner* v. *Goltra* (1934), 293

U.S. 155, 158. *United States* v. *The Pomare* (1950, D. Hawaii), 92 F. Supp. 185, 190-192.

The petitioner, having invoked the provisions of the Jones Act, had the burden of proving that the aerial fish-spotter was "a seaman" and a "member of the crew of a vessel" within Jones Act contexts and under the Federal rule for the submission of a Jones Act case to a jury. *Swanson* v. *Marra Brothers, Inc.* (1946), 328 U.S. 1, 6-7. *Senko* v. *LaCrosse Dredging Corp.* (1957), 352 U.S. 370, 373-374. *Grimes* v. *Raymond Concrete Pile Co., supra.* This court has said that such issues usually present factual questions to be submitted to the jury on slight evidence, for the Jones Act contains a built-in right to a jury trial, indicating a Congressional intent that such cases are to be resolved by juries. *Senko, supra. Grimes, supra. Wilkerson* v. *McCarthy* (1949), 336 U.S. 53, 69.

Neither the Jones Act nor the L.H.C.A. contains any language that restricts the meaning of the terms "seaman" and "crew member of a vessel." Those terms are not "words of art," with set meaning. They have been variously used to connote different types of seamen. The problem is: Whom did Congress intend to include within those terms—only the conventional crew members, or others within the range of the humanitarian policies of the Jones Act? This court has given said terms broad meaning to effectuate Congressional intent to include those who perform a maritime function in furtherance of the vessel's enterprise. *Warner* v. *Goltra* (1934), 293 U.S. 155, 156-159. *South Chicago Coal & Dock Co.* v. *Bassett* (1940), 309 U.S. 251, 258-260. *Norton* v. *Warner Co.* (1944), 321 U.S. 565, 571-573. *Senko, supra. Grimes, supra.* This results in no cause for lamentation, for, since the terms are expansive, it enables the law to keep pace with modern maritime developments in a scientific age. *Offshore Co.* v.

Robison (1959, 5th Cir.), 266 F. 2d 769, 773-780. *Stanley* v. *Guy Scroggins Construction Co.* (1961, 5th Cir.), 297 F. 2d 374, 377-378. *Bernardo* v. *Bethlehem Steel Co.* (1963, 2d Cir.), 314 F. 2d 604, 608.

The distinction between a "seaman" and a "crew member of a vessel" is that the latter has some "more or less" permanent connection to the vessel, with an obligation to stand by the vessel and further her enterprise. *Warner* v. *Goltra* (1934), 293 U.S. 155, 157-158. One can be a "member of the crew" of more than one vessel. *Williams* v. *Milwhite Sales Co.* (1961, E.D. La.), 197 F. Supp. 730, 732. *Braniff* v. *Jackson Ave.-Gretna Ferry, Inc.* (1960, 5th Cir.), 280 F. 2d 523, 526-528.

The rights afforded to a Jones Act seaman are a matter of status and do not depend on where he performs his work or where he is injured. *O'Donnell* v. *Great Lakes Dredge & Dock Co.* (1943), 318 U.S. 36, 42-43. *Gutierrez* v. *Waterman Steamship Corp.* (1963), 373 U.S. 206, 214-215. The sole requirement of the Jones Act is that the Jones Act seaman be injured "in the course of his employment," and broad scope is given to said terms. *Braen* v. *Pfeifer Oil Transportation Co., Inc.* (1959), 361 U.S. 129, 130-133.

A shipowner by the device of employing an aerial fish-spotter who cannot serve aboard a vessel may not avoid his obligations under the Jones Act in case of injury or death to the said aerial fish-spotter. In this connection the decisions of this court in *Sieracki, Hawn* and *Yaka, infra,* have application, namely that a shipowner by the device of a better division of labor or otherwise (more modern appliances) cannot escape his responsibility for a seaworthy vessel to those performing the "ship's service," for the humanitarian principles involved are the same as those of the Jones Act. *Seas Shipping Co., Inc.,* v. *Sieracki* (1946), 328 U.S. 85, 94-95. *Pope & Talbot, Inc.,* v. *Hawn*

(1953), 346 U.S. 406, 412-413. *Reed* v. *The Yaka* (1963), 373 U.S. 410, 415. *Spann* v. *Lauritzen* (1965, 3d Cir.), 344 F. 2d 204, 209.

B. The Fact that the Defendants did Not Pay the Fish-Spotter's Wages and the Fact that the Nature of his Work is to Give Directions to the Ship's Crew does Not Preclude him as Matter of Law from being an Employee of the Defendants.

The trial judge, in directing verdicts under the Jones Act counts, gave as additional reasons that Marino was not paid by the defendants, and, since he set the fishing vessels on fish, he was in control, and not the defendants (R. 41). The Supreme Judicial Court said: "We prefer to base our decision on the ground stated by the trial judge that there was no evidence on which to base a finding that Marino was a 'member of the crew' of any of the defendants' vessels" (1966 A.S. at 51). The giving of directions, especially where the workman's job is supervisory, and the method of payment of wages are merely factors to be considered with all other factors in determining the employer-employee relationship. Restatement, Agency 2d, § 220 (1958).

The petitioner, having invoked the provisions of the Jones Act, had the burden of proving an "employer-employee" relationship. This court has said that those terms as used in the F.E.L.A., incorporated into the Jones Act by reference, are used in their conventional sense (*Robinson* v. *Baltimore & Ohio Railroad Co.* (1915), 237 U.S. 84, 93-94) and present factual elements such as to make it a jury question under appropriate instructions as to the various relevant factors. Only if reasonable men could not reach differing conclusions on the issue may the question be

taken from the jury. *Baker* v. *Texas & Pacific Railway Co.* (1959), 359 U.S. 227, 228. *Ward* v. *Atlantic Coast Line Railroad Co.* (1960), 362 U.S. 396, 399.

The test or standard for determining whose employee a workman is, as stated by this court, is whose business is being performed. The right to control is merely indicative of that. *Linstead* v. *Chesapeake & Ohio Railway Co.* (1928), 276 U.S. 28, 32-34. Other courts stress the right to control without reference to whose work is being done. But the right to control is a conclusion drawn from a consideration of all relevant facts, and the question of whose work is being done is a factor which the jury must consider in determining the right to control. The right to control is not a single "magical solvent," for it must be considered in the light of other incidents relating to the work to be performed. *Byrne* v. *Pennsylvania Railroad Co.* (1958, 3d Cir.), 262 F. 2d 906, 911-913. Restatement, Agency 2d, § 220 (1958), sets out a series of factors to be considered. See also section 227, Comment (*a*), and section 517 on "lent servant doctrine."

C. The Evidence of the Aerial Fish-Spotter's Status as a Jones Act Seaman and an Employee of the Defendants within Jones Act Contexts and the Federal Rule for the Submission of a Jones Act Case Required Submission of the Case to the Jury.

The decedent was a commercial fisherman, familiar with fish-spotting, who performed a strictly maritime function necessary in seining for porgies (R. 5, 7, 17). His task was formerly performed by one of the ship's crew, mastheadsman, and still is when the airplane is unavailable (R. 7-8). It is a task so integrated with the work of the ship's crew that a single unitary piece of work was being per-

formed, no part of which could be delegated without delegating the whole of it, and the whole of it could not be delegated, for the defendants were duly licensed by the United States to carry on the fishing trade (R. 13). See *Stanley* v. *Guy Scroggins Construction Co.* (1961, 5th Cir.), 297 F. 2d 374, 377, where the court pointed out that, where workmen combine with crew members to perform an *integrated task* so that they are performing a single function, they can be considered Jones Act seamen. The decedent had a "more or less" permanent attachment to the defendants' vessels with an obligation to further their enterprise, for the defendants had the right to command his services (R. 6, 14). The Jones Act intended to protect workmen in the decedent's category. As was indicated in *Wilkes* v. *Mississippi River Sand & Gravel Co.* (1953, 6th Cir.), 202 F. 2d 383, 388, where workmen are hired to perform the tasks of crew members and assume like peril, they should not be paid off in lesser rights when injured.

The decedent was an "employee," inasmuch as he was paid by the week and was not in business for himself (R. 5). The problem is: Whose employee was he at the time of the casualty? He was in the general employ of Gloucester, for he was paid by it (R. 6). But it could be found that he was not hired to perform the work or business of Gloucester. The fish caught belonged to the vessel owners and was simply sold to Gloucester (R. 4, 13), and its interest was merely to obtain a steady supply of fish to carry on its processing business. As a matter of fact, the defendants by their tactics exerted pressure on Gloucester to pay the decedent's wages. Although requested, they refused to pay decedent's wages, claiming poverty (R. 5). They did, however, share the cost of the planes used to spot fish (R. 5, 6). Gloucester exercised no control over the de-

cedent, and the decedent was so informed (R. 7).[1] Although Gloucester had limited radio communication with the planes and boats, it exercised no control over Marino (R. 6).

The jury could find that the defendants had the right to command the decedent's services although he was paid by another. The decedent's duty was to show up at Plum Island in the early morning hours, board the Auclair plane, and transmit to the pilot the information where to go and set the fishing vessels on fish (R. 8, 9, 11, 14). The fishing vessels frequently inquired of the whereabouts of the planes (R. 6). See *Byrne* v. *Pennsylvania Railroad Co., supra,* and *Dunn* v. *Conemaugh & Black Lick Railroad* (1959, 3d Cir.), 267 F. 2d 571, 576-577.

The jury could also find that the work that the decedent performed was so integrated with the work performed by the ship's crew that a single task was being performed and the decedent was a "lent servant." *Stanley* v. *Guy Scroggins Construction Co., supra.* The jury could also find that the defendants had the right to control the work being done. *Baker* v. *Texas & Pacific Railway Co., supra. Ward* v. *Atlantic Coast Line Railroad Co., supra.*

The fact that the case was submitted to the jury under the Massachusetts Death Statute, G.L. c. 229, § 2C, which allowed a recovery for a person not in the defendants' employment or service, and the jury verdicts for the petitioner are not dispositive of the Jones Act counts. The trial judge directed verdicts for the defendants under the Jones Act counts because he considered that the decedent was not in the employ of the defendants under Jones Act contexts (R. 41) and neither party could argue that he was in the

[1] Decedent was told by Gloucester that he would be working in an area where Gloucester could not control him, and all Gloucester could do was to pay his wages (R. 7).

employment or service of the defendants. The trial judge employed an erroneous test prejudicing the plaintiff. *Ward* v. *Atlantic Coast Line Railroad Co., supra. Tipton* v. *Socony Mobil Oil Co., Inc.* (1963), 375 U.S. 34, 35-36.

However, the jury's verdict under the Massachusetts Death Statute has resolved the issues of negligence, contributory negligence and legal causation.

VII. Conclusion.

The taking over of the functions of the jury by inferior courts and courts of appeal is a very serious matter. There is little difference between taking a verdict away from a petitioner and preventing her from obtaining one by withdrawing her case from the jury.

The petitioner submits that where the highest court of a state has interpreted the Jones Act so as to restrict its application to seamen who serve aboard a vessel in a novel case, heretofore undecided, contrary to some clear pronouncements of this court, and affecting a whole industry, certiorari should be granted.

HARRY KISLOFF,
53 State Street,
Boston, Massachusetts,
Attorney for Petitioner.

Of Counsel,
PETER J. NEEDHAM.

[Appendix follows.]

Appendix A.

Docket Entry of Judgment.

January 17, 1965

Judgment for plaintiff vs. all defendants
except Rosemarie V. Inc.
as to Counts 3, 7, 15 and 19

Damages	-	$7,863.18
Costs	-	$ 442.03

Appendix B.

Rescript.

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court for the Commonwealth
At Boston, January 6, 1966

In The Case Of
FRANCES MARINO, Administratrix
vs.
TRAWLER EMIL C, INC. & Others

pending in the Superior Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.,—

"Plaintiff's exceptions overruled."
"Defendants' exceptions overruled."

January 6, 1966

By the Court, RICHARD A. MCLAUGHLIN, Clerk

Copy
Attest:—THOMAS DORGAN, Clerk

Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

Appendix C.

Reasons of the Trial Judge for Directing Verdicts under the Jones Act.

I want to say for the record, so my reason for doing what I did will be known in the event of the matter being carried to higher authority, as to the Jones Act counts, to which I shall, pursuant to the allowance of the defendants' motions, direct verdicts for the defendants when the jury arrive, there is no reasonable evidentiary basis to support a jury finding that Wezesa, the decedent, at the time of his death was a seaman or member of the crew of any vessel or vessels here involved, under the Jones Act. That is, I feel, sufficient to warrant a directed verdict on the four counts under the Jones Act.

There is also unrepudiated and clear evidence that Marino was never an officer on board or a member of the crew of the four boats involved, and was not paid either directly or indirectly by them; and, further, he was not subject to the control, legal or actual, of anyone—even the pilot of the plane in which he was riding, in connection with the fishing operation. It was he, in fact, who contacted, and to some extent controlled, the operation of both the plane and the boats during the fishing operation.

Appendix D.

Opinion of the Court.

S-13,405

FRANCES MARINO, administratrix, *vs.* TRAWLER EMIL C, INC. & others.

SPALDING, J. The plaintiff, administratrix of the estate of Michael Marino, brings this action of tort to recover for Marino's death under the Jones Act (46 U.S.C. § 688 [1952]), or alternatively under the Massachusetts death statute (G. L. c. 229, § 2C). The defendants are the owners and operators of four fishing vessels out of Gloucester (Hazel B, Pilgrim, Rosie & Gracie, and Rose Marie).

The case was tried to a jury, and at the close of the evidence verdicts were directed for all of the defendants on the Jones Act counts, subject to the plaintiff's exceptions. Motions for directed verdicts on the Massachusetts death statute counts were denied, and the jury returned a verdict against each defendant. The case comes here on bills of exceptions of the plaintiff and the defendants. The question raised by the plaintiff's bill is whether the judge erred in directing verdicts for the defendants under the Jones Act counts. The defendants' bill brings before us exceptions to the denial of their motions for directed verdicts, to the judge's refusal to give certain requests for instructions, and to portions of the charge.

We summarize the relevant evidence as follows: The four fishing vessels of the defendants were engaged in the summer of 1958 in seining porgies from Massachusetts Bay. Before the season opened, and together with the owner of a fifth vessel, the Puritan, the defendants had contracted orally to sell to the Gloucester By-Products Com-

pany (Gloucester) their entire catch. As part of this contract, the executive manager of Gloucester, Edward MacLeod, promised to obtain the services of a plane to spot fish for the boats.[1] MacLeod hired Harold Fogg, who had performed in a similar capacity in prior seasons "for all or most of . . . [the] boats." Fogg was to be paid $12 per hour, which was to cover the use of his plane, gas and oil, and his fish spotting services. Although Gloucester paid Fogg, the owners of each of the five boats reimbursed Gloucester for one sixth of the cost of Fogg's services. None of the defendants took part in the negotiations with Fogg, nor did they inquire into his professional qualifications.

"About midway during the 1958 porgy season," the captains of several of the defendants' boats discussed with MacLeod the possibility of hiring a second plane to spot fish. Fogg suggested another plane owned by a pilot named Auclair, and he was hired on terms similar to Fogg's. Auclair could not spot fish, however, and none of the defendants would assume the cost of providing a spotter to ride in the plane. MacLeod consequently hired Marino (the decedent) for $300 for a seven day week, his salary to be paid by Gloucester without reimbursement by any of the defendants. From the latter part of July, 1958, Marino flew with Auclair, and at times with Weceza who occasionally substituted for Auclair.

Both the Auclair and Fogg planes were registered with the Federal Aviation Agency (FAA) and with the Massachusetts Aeronautics Commission (MAC) as private planes. Auclair had a commercial pilot's license duly registered with both agencies. Fogg had a duly registered

[1] Until a few years prior to the 1958 season, fish spotting was performed by the mastheadsman stationed in the crow's nest of each vessel.

private pilot's license but not a currently valid medical certificate as is required by MAC. Weceza held a private pilot's license registered with FAA but not with MAC; nor did he have a medical certificate registered with MAC.

Upon hiring Fogg, MacLeod inquired about his license, looked at it, but did not read it. He did not ask for nor did he ever see Fogg's plane registration. MacLeod had no knowledge of such matters as pre-flight plans and the like, nor did he ever discuss them with Fogg; but he knew that a commercial pilot's license was required to pilot a plane engaged in fish spotting. He never conversed with Auclair concerning his pilot's license or plane registration, although he told Fogg that the other pilot "must have a commercial pilot's license." MacLeod first learned of Weceza after the accident.

Auclair testified that Fogg never mentioned any pre-flight plans concerning altitudes at which the planes should fly. He stated that when he first asked Fogg about using Weceza on occasion, Fogg did not inquire about Weceza's license but said, "If he is capable, let him go."[2]

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[2] Rules and regulations of the FAA, which were introduced into evidence, included the following:

Rule 43.41, "No person shall pilot an aircraft under authority of a pilot's certificate issued by the Administrator unless he has a medical certificate showing that he has the physical requirements appropriate to a rating."

Rule 43.60, "A private pilot shall not pilot aircraft for compensation or hire except that he may pilot aircraft in connection with any business or employment, if the flight is merely incidental thereto."

Rule 43.61, "A commercial pilot may pilot aircraft for hire."

Rule 60.15, "No person shall operate an aircraft in such proximity to another aircraft so as to create a collision hazard."

Rule 60.12, "Amended April 10, 1957. Special flight activities which require such preoccupation by the pilot with cockpit duties as would prevent adequate vigilance outside the cockpit for the purpose of collision avoidance without compensation for such re-

Generally, the planes left early in the morning to search a fishing area designated by the defendants, the details of the search being left to the pilots. Upon locating a school of fish the spotter would direct one of the boats to the fish by radio telephone. When approaching the fish, most of the crew would be ordered into the seine boat, and a member of the crew would place himself at the masthead. From there, he could communicate by radio with the spotter who would direct him to the fish and tell him when to drop the seine. The plane would then leave to find another school. One of the ship's captains testified that "he gave a few orders to Marino if he . . . [flew] too close to the fish" during this operation, but never directed at what height or what course he should fly.

On August 28, the four vessels of the defendants were fishing the Plymouth Harbor area. The day was clear with seven to eight miles' visibility and there were three planes in the air spotting fish. At the moment of the accident, Fogg was circling a school of fish for the Pilgrim and directing the seine boat into position for dropping the nets. There was some delay by Fogg in giving the signal to drop. Upon looking up, the Pilgrim's acting captain, Frontiero, saw the planes of Fogg and Auclair about twenty feet apart and on a collision course. They crashed and dropped into the sea, killing all of the occupants: Fogg, Marino, and Weceza, who was substituting for Auclair that day. At the time of the accident, the crews of the other three vessels were transferring fish to their mother boats. All were within the general area and some of the crews' members heard or witnessed the crash.

Auclair testified that on the day of the accident oil was leaking from a gasket onto the "left hand corner of the

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duced degree of vigilance by the use of a competent observer or chase aircraft or other equivalent arrangements, shall be evidence of careless or reckless operation."

front windshield and left front side window" of his plane, obstructing the vision of the pilot. He met Weceza at Marshfield at noon so that Weceza might relieve him, but neglected to tell him about the oil leak. Weceza left Marshfield around 12:20 P.M. "to join Fogg." The accident occurred between 12 noon and 1 P.M.

There was testimony that although no one was ever specifically assigned to look out for approaching aircraft, the crewmen and captains did in fact warn Fogg and Marino of such hazards. One witness testified that his boat warned the planes of other aircraft "once or twice a day, depending on the area." There was also testimony that on several occasions Fogg requested individual employees of the defendants to watch for other planes and to warn him of their presence.

From the fact of the collision, and from the lack of testimony as to any actual warning having been communicated, it would have been reasonable for the jury to infer that no communication of their proximity was given to either plane immediately prior to the crash. The chief investigator of the Massachusetts Aeronautical Commission testified that in his opinion the pilots should have had a pre-flight plan to fly at different altitudes.

It is agreed that neither Marino, Fogg, nor Auclair was listed as crew members of any of the four boats involved; that none of them served in any capacity on board the boats; and that the four boats were duly licensed.

The Jones Act Counts.

There was no error in directing verdicts for the defendants on the Jones Act counts. We lay to one side the defendants' argument that this case is not within the admiralty jurisdiction of the United States, there having been

no proof offered as to whether Marino died in the air or upon the sea (see *Weinstein* v. *Eastern Airlines, Inc.* 316 F. 2d 758 [3d Cir.]). We prefer to base our decision on the ground stated by the trial judge that there was no evidence on which to base a finding that Marino was a "member of the crew" of any of the defendants' vessels. The United States Supreme Court has held that the benefits of the Jones Act is restricted to a "member of a crew of the vessel." *Swanson* v. *Marra Bros. Inc.* 328 U.S. 1. In a subsequent decision it held that it was for the jury to determine whether a pile driver who was injured while being transferred from a tug to perform work on the "Texas tower" radar station, after that structure was permanently anchored to the ocean floor, was a member of the crew of a vessel. *Grimes* v. *Raymond Concrete Pile Co.* 356 U. S. 252. This has not been construed to mean, however, that in no circumstances may a court rule as matter of law that the Jones Act is inapplicable because the complainant was not a "seaman" or a "member of the crew." See *Sullivan* v. *American President Lines, Ltd.* 206 F. Supp. 547 (N. D. Cal.). In the *Sullivan* case, the court pointed out that, as part of the "maintenance gang," the plaintiff was not required to perform duties aboard any vessel. In *Chance* v. *United States,* 266 F. 2d 874 (5th Cir.), the plaintiff, an aerial fish spotter, sought the status of a "member of the crew" of certain foreclosed fishing vessels in order to obtain a lien superior to that of a mortgagee under the Ship Mortgage Act of 1920. In upholding the trial judge's finding that the plaintiff did not qualify, the court pointed out that the minimum requirement for status as a "seaman" is actual presence on some type of vessel. It is agreed that Marino never served in any capacity on board any of the defendants' boats. We hold that this fact is determinative.

THE MASSACHUSETTS DEATH STATUTE COUNTS.

1. There was sufficient evidence to take the case to the jury on the theory that the activity being performed by the planes was of an inherently dangerous character, such that the defendants could not avoid liability for injury to a third party even if the pilots were independent contractors. Whatever might be said of fish spotting per se, the fact that Fogg flew his plane and spotted simultaneously, usually in the general proximity of the Auclair plane, created a circumstance likely to cause injury unless special precautions were taken. *Kunan* v. *DeMatteo,* 308 Mass. 427, 429. *Whalen* v. *Shivek,* 326 Mass. 142, 151. *Ducey* v. *Springfield Co-op. Bank,* 341 Mass. 449, 450-451. The defendants' argument that they lacked the ability to recognize this danger or the need for special precautions is without merit. Compare *Thurlow* v. *Provincetown,* 337 Mass. 450, 455. The defendants knew that Fogg flew alone, several were specifically asked to warn him of other planes, and all of them at various times endeavored to warn him whenever other aircraft were sighted. These circumstances were conditions of the work being performed. Compare *Doyle* v. *LaCroix,* 336 Mass. 484, 488, holding that cases of negligence incidental to nondangerous work are subject to a different rule.

2. The trial judge also left to the jury the question whether the planes' pilots were servants of the defendants, thus permitting the jury to find the defendants liable under the doctrine of respondeat superior. The defendants excepted to the failure of the judge to charge that the requisite right of control could not as matter of law be found on the evidence, to portions of the charge, and to the refusal to grant requested instructions.

Under our cases the existence of the master-servant relationship depends primarily upon the right of a principal

to control the way in which work is performed for him. *McDermott's Case,* 283 Mass. 74, 76. *Doyle* v. *LaCroix,* 336 Mass. 484, 487. While it has been stated that the right to control must extend "farther into the minutiae of the alleged servant's conduct than merely telling him where to go" (*Patterson* v. *Barnes,* 317 Mass. 721, at 723) or must reach the "details" of the operation (*Gladney* v. *Holland Furnace Co.* 336 Mass. 366, 368), this does not rule out the possibility that a pilot may be the servant of persons who may lack the necessary knowledge to direct the details. See *Tetting* v. *Hotel Pfister, Inc.* 221 Wis. 141, 147. "One may be a servant though far away from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right to control rather than the exercise of it that is the test." *McDermott's Case,* 283 Mass. 74, 77. In the case of an airplane performing a function closely related to and in coördination with an operation taking place below, the right of those on the ground to direct such things as the speed, altitude, and movements of the plane may be sufficient to warrant a finding that the master-servant relationship exists.

At the time of the accident, Fogg was circling a school of fish so that the seine boats of the Pilgrim would surround the entire school with their nets. He was generally in radio contact with the mastheadsman at such times. Frontiero, the acting captain of the Pilgrim, testified that he had ordered Marino in a few instances to fly less close to the fish. We are of opinion that a jury might properly infer from this evidence that during this phase of the fish spotting operation the conduct of the pilots was subject to any reasonable orders of the defendants in regard to their altitudes, speed, or movements. The cases holding that employees driving to a specific job in their own cars are not as

a matter of law servants are distinguishable. See *Shea* v. *Bryant Chucking & Grinder Co.* 336 Mass. 312; *Gladney* v. *Holland Furnace Co.* 336 Mass. 366. In those cases there was no basis for inferring a right to control the route or the manner of operating the vehicle.

The judge was correct in refusing to give the defendants' requested instructions on the test for determining whether the pilots were servants at the time of the accident.[3] Request No. 11 speaks merely of "control" when the right to control is the proper test. In request No. 12 the statement that "[t]he right of control . . . must extend . . . to the details of the work to be done" may properly have been regarded as capable of leading the jury to believe that they would have to find the right to control every detail of the plane's operation. The charge given allowed the jury to find the pilots to be servants of the defendants, "If you find that the boats had the right to control those pilots at any time, up aloft spotting or flying . . . if you find the boats had control over their movements." They were also

[3] Defendants' requested instructions: 11. "Under . . . [the death act counts] if you find that the operators of the planes were carrying on their own individual business which was not essentially a part of the defendants' general business and which individual business requires special skill and was of a temporary relation with the defendants for a specified piece of work, with control over the work remaining with the pilots, with the pilots supplying their own equipment, then the pilots are independent contractors and the defendants are not liable for the negligence of the pilots in the death of Marino." 12. "Under . . . [the death act counts] the primary test to determine whether the pilots were agents of the defendants or independent contractors of the defendants is the right to control the mode of doing the work and not the actual exercise of the work. The defendants' right to make suggestions is not a right to control and to make the pilots agents in this case. The right of control in the defendants must extend to the means of accomplishment and to the details of the work to be done."

instructed that "a person might well be a servant of another without that other having the right of control over his every movement." These instructions were appropriate in the circumstances of this case. The foregoing portion of the opinion holding that the question of control was rightly left to the jury is that of a majority of the court.

3. The defendants also argue that their motions for directed verdicts should have been granted since no positive evidence of the actual cause of the accident was introduced and thus any finding that negligence for which the defendants might be responsible caused the collision would be based solely on conjecture. See *Williams* v. *United Men's Shop, Inc.* 317 Mass. 319; *Smith* v. *Rapid Transit Inc.* 317 Mass. 469; *Boyle* v. *Cambridge Gas Light Co.* 331 Mass. 56, 62-63.

On the evidence, the jury could have found that the pilots' lack of qualifying credentials, the absence of pre-flight plans for set altitudes, the fact that Fogg spotted fish as he flew, Fogg's function in the encircling process, Auclair's failure to warn Weceza with respect to the oil leak, or to correct it, and the absence of any warning from below, either separately or in combination, had a causal relation to the collision. Such a finding would not rest on conjecture, but on facts from which the jury could conclude that these factors or some of them, rather than any sudden death or inexplicable event, caused the collision.

4. The defendants' contention that Marino must be held as matter of law to have assumed the risk of all possible causes of the collision cannot prevail. The question was one of fact.

5. We reject the contention of Rose Marie, Inc. that it could not be made a defendant by a motion to amend after the expiration of the statutory period for suing under the

death statute.[4] This point is governed by *Genga* v. *Director Gen. of Railroads,* 243 Mass. 101, 104, *Chandler* v. *Dunlop,* 311 Mass. 1, 7, and *Peterson* v. *Cadogan,* 313 Mass. 133.

Plaintiff's exceptions overruled.
Defendants' exceptions overruled.

Appendix E.

Jones Act.

The Merchant Marine Act of 1920, commonly known as the Jones Act, 46 U.S.C. § 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for

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[4] The evidence on which this contention is based is: In the writ, which was seasonably served on all defendants named, one of the defendants, Rose Marie, Inc., was erroneously described as Rose Marie V, Inc. After the expiration of the statutory period for commencing an action under the death statute, the plaintiff moved to amend the writ by bringing in Rose Marie, Inc. as a defendant and the motion was allowed. Service was thereafter duly made on that defendant.

death in the case of railway employees shall be applicable. . . ."

Appendix F.

The Federal Employers' Liability Act.

The Federal Employers' Liability Act, 45 U.S.C. § 51:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . ."

Appendix G.

The Longshoremen and Harbor Workers' Compensation Act.

The Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 902 (3):

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person en-

gaged by the master to load or unload or repair any small vessel under eighteen tons net."

§ 903 (a):

"No compensation shall be payable in respect of the disability or death of— (1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . ."

Appendix H.

Massachusetts Death Statute.

Massachusetts Death Statute, G.L. c. 229, § 2C:

"Except as provided in sections one, two and two A, a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one." (As amended through St. 1951, c. 250.)